FILED
JUN 30 1949

IN THE

Supreme Court of the United States

No. 152...

JOHN E. GIBSONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES H. BRADY,
810 Edison Bldg.,
Toledo, Ohio,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

No. .....

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES H. BRADY,
810 Edison Bldg.,
Toledo, Ohio,

Attorney for Petitioner.

INDEX

Page

Opinion of the Court Below 2

Summary Statement of the Matter Involved 3

Jurisdiction of This Court 11

Questions Presented 13

Reasons Relied on for Allowance of the Writ 14

Prayer 31

Appendix A 32

Appendix B 34

Cases Cited

Baron vs. Kurn, Trustee, 349 Mo. 1202 27

Dooley vs. Lehigh Valley R. Co., 21 Atl. Rep. 2nd 28

Illinois Central R. R. vs. Moore, 112 Fed. (2d) 29

J. I. Case Co. vs. National Labor Relations Board, 321 U. S. 332, 88 L. Ed. 762 25

Yazoo and M. V. R. Co. vs. Webb, 64 F. (2d) 902 25

Authorities Cited

Fed. Code Annotated, Vol. 10A, Sec. 151-5 ..... 11, 22

Fed. Code Annotated, Vol. 10A, Sec. 228(d) 12, 21

U. S. Supreme Court Rule 38-(5b.) 11

IN THE

Supreme Court of the United States

No. .....

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now John E. Gibbons, petitioner herein, and respectfully petitions this Honorable Court to grant a Writ of *Certiorari* to review the opinion and judgment of the United States Circuit Court of Appeals for the Sixth

Circuit, rendered and entered on the 15th day of December, 1948, rehearing being denied on February 1, 1949, in the case lately pending in said Circuit Court, styled John E. Gibbons, appellant, vs. The Detroit and Toledo Shore Line Railroad Company, appellee, being Cause No. 10636 on the docket of said Circuit Court (R. 236, 245); said judgment of said Circuit Court affirming the judgment of the United States District Court, for the Northern District of Ohio, Western Division, Judge Hicks and Judge McAllister, Circuit Judges, concurring in said judgment upon the grounds found by said District Court, while Circuit Judge Allen concurred in the judgment *"not on the grounds stated"* in the opinion of said Circuit Court, but upon a ground not raised in said Circuit Court or determined by said District Court, (R. 236); and which said affirmance of said District Court judgment by said Circuit Court of Appeals became final on February 1, 1949, by the denial by said Circuit Court of the petition for rehearing. (R. 245.)

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals, in said cause of John E. Gibbons (appellant), petitioner herein, vs. The Detroit and Toledo Shore Line Railroad Company (appellee), respondent herein, which petitioner seeks to have reviewed, appears on page 236 of the transcript of the printed record filed herewith, a correct copy of said opinion being appended hereto. (P. 32.)

SUMMARY STATEMENT OF THE MATTER INVOLVED

This suit was instituted in the Common Pleas Court of Lucas County, Ohio, by John E. Gibbons, petitioner herein, on the 6th day of January, 1944; and, upon motion of respondent herein, was removed to the District Court of the United States for the Northern District of Ohio, Western Division, where petitioner herein filed his original complaint on February 29, 1944, and his final amended complaint on May 20, 1946, set forth in the record, (R. 2 to 9), seeking to have his seniority rights restored as a fireman in the employment of respondent; to recover damages for time lost by reason of respondent's failure and refusal to restore petitioner to his seniority rights; and to afford petitioner medical examinations, or an opportunity therefor, at reasonable times.

It is undisputed that John E. Gibbons, petitioner herein, signed a written application for employment by respondent, as a locomotive fireman, on February 14, 1929 upon a form, prepared and printed by respondent, a correct copy of the lower portion of said application, (Exhibit B), being as follows:

"....

If put to work, I understand that my employment is only temporary until this application is approved.

Signature (signed) John Edward Gibbons

Address .....

Dated 2/14/1929

.....

Recommended for employment as .....

At .....

.....

Date .....

Approved:

.....

General Manager "

It is undisputed that immediately after signing this application petitioner successfully passed respondent's required physical examination by Dr. Briggs, respondent's medical examiner in Toledo, Ohio (R. 80); that petitioner was then put to work as a fireman in respondent's Lang Yard, Toledo, Ohio, by one J. F. Hazel, respondent's superintendent in charge of hiring firemen in Lang Yard, the secretary of said J. F. Hazel having theretofore taken petitioner's application for employment at the request of J. F. Hazel (R. 81); that petitioner continued to work as a fireman for respondent in Lang Yard during February and March, 1929; was furloughed by respondent on account of reduction in force and slack business in March, 1929 (R. 82); and was given a leave of absence by respondent in May, 1929 (R. 198); all in accordance with the written agreements. It is undisputed that petitioner would have worked regularly for respondent as a firman throughout the entire year of 1929 had it not been for slack business, (R. 200); that petitioner was recalled to active duty by respondent in December, 1929, as a fireman in Lang Yard, but that after working a few days appellant was again furloughed because of reduction of force and slack business (R. 82); that owing to the general depression, existing from the fall of 1929 to 1935, petitioner and several of respondent's firemen, senior to petitioner on respondent's firemen's rosters, were not recalled to active duty by respondent until 1935 (R. 184, 200); that in 1934, with the assistance of J. F. Hazel, petitioner secured four months' employment by respondent as a machinist helper in the round house at Lang Yard, while awaiting his recall by respondent to active duty as a fireman (R. 83); that on January 29, 1935 respondent wrote petitioner that it was again in a position to put petitioner to work as a fireman, (R. 83, 84); that petitioner immediately reported to respondent for work, in response to said recall, in compli-

ance with Article 40 of the written agreements between respondent and its firemen (R. 4); that petitioner then started to work as a fireman on January 30, 1935, the very next day after his recall (R. 84); that after working for respondent as a fireman for about fifteen days in Lang Yard in January and February, 1935, petitioner was requested by respondent to submit to a physical examination by Dr. Burkholder, respondent's then Toledo medical examiner, (R. 84): that on February 18, 1935, said J. F. Hazel wrote to Dr. Burkholder, (Exhibit 18), stating: "You will please arrange to take a physical examination of John E. Gibbons, who has returned to service as a fireman"; that petitioner was then orally informed by respondent's crew dispatcher that he was out of service on account of his physical condition, (R. 84, 107); that the report of Dr. Burkholder's examination does not appear in the record (R. 172); that said J. F. Hazel, who hired petitioner as a fireman in 1929, and who was again in charge of hiring firemen for respondent in March, 1935, arranged for two medical examinations of petitioner by Dr. Stockwell, respondent's chief medical examiner in Detroit, Michigan, (R. 85); that on March 11, 1935 Dr. Stockwell wrote to J. F. Hazel (Exhibit 20) that "since my letter of March 2, we have seen this man again, (referring to John E. Gibbons), we are unable to find any albumen in his urine today. * * * I believe it would be safe to take him into the service now"; that after these examinations by Dr. Stockwell petitioner reported for work as a fireman but was informed that he was still out of the service (R. 85, 99); that on March 7, 1935, J. F. Hazel wrote and delivered to petitioner a letter, (Exhibit 8, R. 30), assuring petitioner that he had been taken out of the service "*because of his physical condition,*" and assuring petitioner that if his physical condition could be cleared that petitioner "can and will be returned to service," pro-

viding petitioner could pass the physical examination required by respondent, (R. 30); that J. P. Main, respondent's general manager in Detroit, then wrote to Mr. Hazel, (Exhibit BB), dated March 15, 1935, advising Mr. Hazel that on account of petitioner's condition of health he, Mr. Main, could not then approve petitioner's application for "re-employment"; that from March, 1935 until July 16, 1940, petitioner repeatedly requested respondent to afford him additional medical examinations, all of which were refused (R. 99, 101); that upon his own initiative petitioner successfuly passed a medical examination by Drs. Stockwell and Schulte, respondent's chief medical examiners in Detroit on July 16, 1940; but that thereafter respondent continued to refuse to restore petitioner to active duty, to his seniority rights, (R. 88), or to afford petitioner additional medical examinations or an opportunity therefor; and that it was not until September 24, 1940 and October 8, 1940 that E. L. Ray, respondent's then general manager, to whom petitioner had applied for a restoration of his seniority rights, informed petitioner by letter that his predecessor had promptly disapproved petitioner's application for employment, (R. 11), (Exhibits J and K). Mr. Ray's said letters in 1940 of necessity referred to Mr. Main's said letter of March 15, 1935, (Exhibit BB), when petitioner was recalled to active duty. No new application for employment was made or pending in 1935. No predecessor of Mr. Ray had ever disapproved petitioner's application of February 14, 1929 in writing or otherwise.

Article 52 of the written agreements, (Exhibits 1, 2 and 3) (R. 4), entered into on November 15, 1924, and as supplemented March 20, 1928, by and between respondent and its firemen, which were in full force and effect from said dates until January 1, 1945, and thereafter, binding petitioner and respondent to the conditions thereof, provides as follows:

"ARTICLE 52

The company will cause to be posted on February 1 and August 1 of each year a seniority list at terminal points." (R. 4);

that in compliance with Article 52 respondent caused to be printed and posted on August 1, 1929 a seniority list of its firemen, (R. 181,) (Exhibit 13), which seniority list was captioned and labelled "Seniority List of Firemen as of August 1, 1929," (Exhibit 13), and contained petitioner's name with the effective date of his seniority as of February 14, 1929, under a column on said seniority roster headed by the words "Date Entered Service" (Exhibit 13); that on February 1, 1930, July 1, 1930 and February 1, 1931 respondent posted similar seniority lists of its firemen, in compliance with said Article 52 of the Working Agreements, each of which contained petitioner's name with the effective date of his seniority, and the date he entered respondent's service as of February 14, 1929, (Exhibits 14, 15 and 21); and that there was no evidence that petitioner knew his name was omitted from respondent's seniority rosters after the roster of February 1, 1931 and up to the time petitioner was recalled to active service on January 29, 1935, (R. 83, 84).

Jedediah Weeks, respondent's trainmaster, was the only official of respondent who testified as to the interpretation given by respondent's officials to the effect of the publication by respondent of seniority lists of its firemen, as provided in Article 52 of the working agreements (R. 4). Jedediah Weeks, in his deposition, taken by respondent, testified positively upon cross-examination that the publication of respondent's roster of February 1, 1931, (Exhibit 21), showed that as of that date petitioner had fully qualified as a fireman and was a regular employee of respondent, (R. 113 to 127 inclusive), his pertinent testimony on this point being as follows: "That he (referring

to John E. Gibbons) was fully qualified." (R. 113, 114); "Had passed the physical." (R. 114); "And also had passed all other requirements." (R. 114); "That he had passed all preliminary qualifications." (R. 121); *"That his application had been approved by Mr. Main."* (R. 122); "that signified that the man had been fully qualified and he had been investigated." (R. 127).

In its answer (R. 10, 11) respondent alleges that respondent never accepted petitioner's application for employment of February 14, 1929; that petitioner was never employed by respondent as one of its regular firemen; *that the Articles of the Working Agreement between respondent and its firemen, while correctly set forth in the amended complaint, (R. 3, 4, 5), are not material to the issues in the case do not affect petitioner's seniority rights, (R. 10); that on January 29, 1935 respondent's trainmaster invited petitioner to apply for work as a fireman but that petitioner failed to pass the physical examination at that time; and that on October 8, 1940 the general manager informed petitioner that his former application for employment had never been accepted or approved, (R. 11).*

This case was tried in the District Court, without the intervention of a jury, and the case was tried "solely upon the facts and the law, without regard or attention to the question of damages." (R. 160.)

In its memorandum opinion of March 25, 1947 (R. 13) the District Court found: "that plaintiff never became a employee of the respondent," (R. 13); that petitioner's application for employment "showed on its face that the employment was to be only temporary until the approval of the application was *endorsed thereon* by the general manager of the respondent" (R. 13); that "such approval by the general manager was never endorsed on the application," (R. 13); and that there was no evidence to substan-

tiate petitioner's claim that the approval by the general manager "could be waived," should it be assumed that such were possible," (R. 13); and that respondent merely allowed petitioner to work on a "temporary or probationary basis until such time as his application could be approved," (R. 14), a correct copy of said opinion being appended hereto. (P. 32.)

The Circuit Court of Appeals, in affirming the judgment of the District Court, by a divided court, upheld the judgment upon the specific ground that appellee (petitioner herein) "*never became an employee of respondent,*" (R. 236), stating as follows, in its opinion:

> "The District Court found that under the terms of appellant's application for employment and other evidence in the record, *appellant never became an employee of the appellee, but was allowed to work on a temporary or probationary basis; hence the court held that appellant had no seniority rights,* and that his right to damages had not been proved.
>
> While other features were presented in the case upon which the District Court did not rule, *we cannot say that its findings upon this phase of the case are unsupported by the record.* It follows that the judgment must be, and hereby is, affirmed."

Circuit Judge Allen did not concur in the judgment "*on the ground stated,*" but upon a question of jurisdiction not presented to the Circuit Court.

The opinions of the lower courts show that Circuit Judge Allen did not agree with the opinion of the District Court and of Circuit Judges Hicks and McAllister, that petitioner "never became an employee of the appellee (respondent herein)."

A determination of this case by this Honorable Court does not involve a consideration of disputed evidence. The judgments of both lower courts were based squarely upon an erroneous interpretation of the written "application

for employment," by holding that said application "*showed on its face* that the employment was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent (R. 13), when as a matter of simple grammatical construction the written application did not require the written approval by the general manager on the face thereof, but only provided that petitioner's "employment is only temporary until this application is approved." There is a period after the word "approved." Approval by the *general manager* was not required. The application could be approved by any customary method, according to the quoted undisputed testimony of Mr. Weeks, (R. 113, 114, 121, 122, 127), and in accordance with the provisions of the written agreements. The application could be approved by the publication by respondent of seniority firemen's rosters under Article 52 of the working agreements. The application could also be approved by granting petitioner a leave of absence in writing in May, 1929, (R. 198); by admittedly recalling petitioner to active duty in December, 1929, and again on January 29, 1935 (R. 82, 83, 84); by respondent's letter to petitioner of March 7, 1935, (Ex. 8, R. 30); and by other admitted actions by respondent wholly inconsistent with the asserted claim of respondent that petitioner's employment was only temporary.

By stipulation, (R. 31), all original papers and exhibits were forwarded to the Circuit Court by the District Court, and have now been filed in this court. We have quoted herein all pertinent portions of such exhibits.

JURISDICTION OF THIS COURT

The questions here presented for the consideration of this Honorable Court disclose that the United States Circuit Court of Appeals for the Sixth Circuit has decided important questions of federal law which have not been, but should be, settled by this court; has decided federal questions in a way probably in conflict with applicable decisions of this court; and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision; and that this court does have jurisdiction to hear and determine the substantial federal questions here presented. (U. S. Supreme Court Rule 38-(5b.)

The term "employee" is defined in the Railway and Carriers by Air Labor Act, as follows:

> "The term 'employee" as used herein *includes every* person in the service of a carrier (subject to the continuing authority to supervise and direct the manner of rendition of his service) *who performs any work defined as that of an employee* or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which employees may be organized by their voluntary action, *nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.*" (Vol. 10A Fed. Code Annotated, Section 151-5.)

The Railroad Retirement Act of 1934, and as amended in 1935 and 1937, provides as follows:

> "An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or *on leave of absence, or absent on account of sickness or disability;* * * *." (Vol. 10A Fed. Code Annotated, Section 228(d).)

Under the Railway and Carriers by Air Labor Act and the Railroad Retirement Act, the question of whether or not petitioner ever became an employee of the respondent railroad, under the circumstances of this case, presents Federal questions which have never been determined, and which are of vital importance to every railroad employee in the United States. The written agreements between respondent and its firemen, (R. 3, 4, 5) are controlling as to the seniority questions here presented. The Circuit Court of Appeals failed and refused to determine the effect of these agreements upon the questions here presented, although specifically requested so to do in petitioner's petition for rehearing, filed in the Circuit Court of Appeals on January 4, 1949 and denied February 1, 1949. (R. 237 to 245.) The Circuit Court of Appeals and the District Court found that the employer-employee relationship was never created and never existed although the undisputed written evidence disclosed that after petitioner was employed by respondent as a fireman on February 14, 1929, the employment relation thus created has continued to exist as provided in Section 228(D), of the provisions of the Railroad Retirement Act of 1934, and as amended in 1937. (Vol. 10A Fed. Code Annotated, Section 228 (d).)

QUESTIONS PRESENTED

(1) Was not respondent railroad by the publication of seniority rosters of its locomotive firemen in 1929, 1930 and 1931, in accordance with the provisions of its written agreements with its firemen, containing petitioner's name, with the effective date of his seniority as of February 14, 1929, estopped from denying the creation and existence of the employer-employee relationship as of February 14, 1929, between petitioner and respondent; and by such publication did not respondent waive its claim that such employer-employee relationship never existed?

(2) As a matter of law did petitioner's written application for employment by respondent railroad *show on its face* that petitioner's employment by respondent was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent? Was it essential to the creation of the employer-employee relationship between petitioner and respondent that the general manager of respondent approve petitioner's written application for employment on the face of the written application?

(3) Could the employer-employee relationship, established between petitioner and respondent railroad on February 14, 1929, be terminated except in accordance with the provisions of the written agreements, theretofore entered into by and between respondent and its locomotive firemen, after respondent had accepted petitioner as a regular fireman in accordance with the provisions thereof?

(4) Did not respondent railroad, in its letter to petitioner of March 7, 1935, (R. 30), (petitioner's Exhibit 8), written by J. F. Hazel, respondent's official in charge of hiring firemen for and on behalf of respondent, affirm the creation and continuing existence of the employer-employee relationship between respondent and petitioner, and was

not respondent, by such letter obligated as a matter of law to return petitioner to active duty if and when petitioner's physical condition became cleared and petitioner could pass the physical examination required by respondent?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

The decisions of the Circuit Court of Appeals and of the District Court have placed in jeopardy the seniority rights of every railroad employee in the United States. Unless these decisions are reversed no employee of a common carrier will know whether he or she is a "regular" employee or is employed on a "temporary" or "probationary" basis, as found by the lower courts.

How can any railroad employee know whether or not his application for employment has been accepted unless he can rely upon the publication of seniority rosters, and other undisputed acts of his employer done in compliance with the written agreements, as proof of that fact? Is it fair or just to permit a common carrier to wait from 1929 to 1940 before informing an employee that it never accepted his application for employment and that such employee has been employed solely on a "temporary" basis because the general manager of such railroad failed to approve the application in writing on the face thereof? The mere statement of this proposition shows its injustice. The employer-employee relationship, as defined in the Railroad Retirement Act, should not be permitted to be jeopardized by such a decision, as the right to retirement benefits will be lost by all such so-called "temporary" or "probationary" employees, where applications may not

have been approved in writing by some designated official of such railroad. Employees should not have to wait from six to eleven years for such an approval or disapproval of an application.

2.

The written agreements between respondent and its firemen, (Exhibits A and B), make specific provision for the protection of the seniority rights of respondent's firemen and engineers. The pertinent provisions of the agreements are set forth in the record (R. 3, 4, 5). After making specific provision for the protection of the seniority rights of its firemen, Article 52 of the Agreements, (R. 4), provides that respondent "will cause to be posted February 1 and August 1 of each year a seniority list at terminal points." The testimony was undisputed that petitioner's name appeared upon the seniority lists posted by respondent for August, 1929, for February and August, 1930, and for February, 1931. The United States Circuit Court of Appeals did not specifically pass upon the question as to whether or not respondent was estopped by the publication of four seniority rosters from thereafter asserting or claiming that petitioner was not an employee of respondent. The District Court, however, "without expressing or intending to express any opinion as to the possibility of respondents waiving such approval," was of the opinion "that there is no evidence here to substantiate such a waiver should it be assumed that such were possible." The District Court found that the publication of the rosters could not bind respondent *unless it was shown that the general manager of respondent had knowledge of the contents of the rosters.* (R. 15, (4).) It was uncontradicted that the rosters were published by respondent in accordance with the provisions of the working agreements. No evidence was offered by respondent that it was customary

for the general manager to approve the rosters before they were published. *Unless railroad employees can rely upon the seniority rosters as evidence of their employment, in protection of their seniority rights, the publication of such rosters would be a vain thing.* It is incomprehensible that the District Court should find that respondent was not bound by the publication of the rosters unless the general manager checked or approved the contents of each roster. Such a contention is wholly untenable. The very fact that the uncontradicted evidence showed that four seniority rosters were printed and posted in accordance with the written agreements is sufficient evidence to bind respondent to the contents of those rosters.

Petitioner's name appeared on each roster as one of its regular employees. Jedediah Weeks, respondent's trainmaster, the only official of respondent who testified on the subject, on cross-examination testified positively that "the publication of petitioner's name upon respondent's seniority list of firemen would indicate that petitioner 'had fully qualified as a fireman and was a regular employee of respondent' (R. 113); that petitioner 'was fully qualified,' 'had passed the physical,' 'had passed all other requirements,' and 'has been accepted as an employee' (R. 114); that petitioner 'had passed all preliminary qualifications' (R. 121); 'that his application had been approved by Mr. Main (general manager),' (R. 122)." The testimony of Mr. Weeks was not contradicted or questioned by any other witness.

The provisions of the Railway Labor Act and the Railroad Retirement Act, hereinbefore set forth, would have no effect whatever in protecting the seniority rights of railroad employees, unless the provisions of the agreements, authorized by the Railway Labor Act, are recognized and enforced by the courts. We submit that the publication of seniority rosters is an established practice by

practically all the common carriers in the United States. Where these seniority rosters are published, in accordance with the provisions of written agreements, common carriers should be bound by the contents of such rosters in determining questions of seniority, unless error is established by such carrier as to the contents thereof. In this case the District Court specifically held that the publication of such rosters, under the written agreements, would not bind the respondent, unless petitioner proved that the general manager of respondent had personally checked and approved such rosters before they were published. Railroads can only carry on their business through their officials. The evidence is uncontradicted that the seniority rosters in the instant case were published and posted in the usual course of business by respondent. We submit that carriers are bound by the contents of seniority rosters, published in accordance with the provisions of the working agreements with their employees, whether such rosters have been checked by the managing officials of such carrier or not; unless the written agreements make special provision for such checking by such officials.

3.

The District Court specifically found that petitioner's application for employment, (Exhibit B) "*showed on its face, that the petitioner's employment was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent.*" (R. 13). The United States Circuit Court of Appeals in its opinion, affirming the judgment of the District Court, (R. 236), specifically found that "the District Court found that under the terms of petitioner's application for employment and other evidence in the record, petitioner never became an employee of the respondent, but was allowed to work

on a temporary or probationary basis; hence the court held that petitioner had no seniority rights and that his right to damages had not been proved." * * * "We cannot say that its findings *upon this phase of the case* are unsupported by the record." Judge Allen, Circuit Judge, did not concur in the judgment of the Circuit Court of Appeals "on the ground stated," but upon a jurisdictional ground.

The opinion of the District Court Judge (R. 13, 14); the findings of fact and conclusions of law of the District Judge (R. 14, 15, 16); and the majority opinion of the United States Circuit Court of Appeals (R. 236), show that the lower courts based their decisions solely and squarely upon their interpretation of petitioner's written application for employment. *It is our contention that petitioner's application for employment, (Exhibit B), does not show on its face that petitioner's employment was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent.* (R. 13.) The sentence relied upon by the lower courts, as a basis for their decision, is the fine print appearing immediately above petitioner's signature, which reads as follows: "If put to work, I understand that my employment is only temporary until this application is approved." It is significant that the sentence ends with the word "approved." There is a period after the word "approved." This sentence does not include the words "by the general manager." Although the general manager and several officials of respondent testified for respondent, none of them testified as to any custom or rule of respondent, requiring the general manager to approve an application for employment, on the face thereof, before an employee became a regular employee of respondent. We submit that petitioner's application was in fact approved by the publication of the seniority rosters, and other undisputed actions of respondent in recognition of such approval, as hereinbefore set

forth, after he passed his physical examination and after his qualifications were fully investigated by respondent. The written application, *upon its face, does not require the written approval by the general manager* as a condition precedent to the establishment of the employer-employee relationship between petitioner and respondent for the following cogent reasons:

(a) The application does not state that petitioner "understood" his employment was to be "only temporary" "until this application is approved" (by the general manager). The sentence ends with the word "approved."

(b) The application itself does not state in what manner the application is to be approved.

(c) The space provided in the lower left hand corner for approval by the general manager is not part of the application itself

(d) There was no evidence that petitioner ever read that portion of the application form below his signature, or that he was ever informed by respondent, orally, or in writing, that the general manager of respondent, in Detroit, had to approve his application before he became a regular employee of respondent in Lang Yard, Toledo, Ohio.

(e) The evidence is uncontradicted that petitioner's application was never in his possession, either before or after he signed it (R. 179), so that he cannot be charged with knowledge of the printing on the application below his signature.

(f) The legal interpretation of the application must be construed most strongly against respondent, who admittedly prepared and printed the application form.

(g) The testimony is uncontradicted that petitioner's application of February 14, 1929, was never sent by respondent to the general manager for his approval or disapproval, but it remained in the possession of George E. Cothran, respondent's chief clerk, in Toledo (R. 179).

(h) On February 14, 1929, petitioner successfully passed the physical examination required by respondent (Respondent's Exhibit 17); respondent completed its check of petitioner's references on March 20, 1929 (R. 193); respondent gave petitioner a leave of absence in May, 1929 (Petitioner's Exhibit 23, R. 198); respondent posted petitioner's name on its seniority roster of August 1, 1929 (R. 181) (Petitioner's Exhibit 13); petitioner was recalled to active duty as a fireman in December, 1929 (R. 82); petitioner's name was then posted by respondent upon its seniority rosters of February 1, 1930, July 1, 1930, and February 1, 1931 (Petitioner's Exhibits 14, 15 and 21); and on January 29, 1935, petitioner was again recalled to active duty by respondent (Respondent's Exhibit F, R. 83, 84). During this entire period petitioner's application was never sent to the general manager for his approval or disapproval. In fact the entire space on the application, below petitioner's signature, is still blank and shows neither approval nor disapproval. How could the general manager approve or disapprove the application, *on the face thereof*, if it was never sent to him for such action?

From the foregoing we submit that the written application did not *show on its face* that the employment of petitioner was to be only temporary until the approval of the general manager was endorsed on the application. There was no evidence whatever of an agreement, understanding, or custom that such approval of the application by the general manager was essential to the creation of the employer-employee relationship. The written agreements between the respondent and its firemen made no provision as to temporary or probationary employment. We do not dispute the right of respondent to check an applicant's physical qualifications, his ability, and his former record of employment before accepting his application for employment. The evidence is undisputed, however, that respondent had completed its check of petitioner's qualifications before posting petitioner's name on its seniority list of August 1, 1929 (R. 180, 181, 200).

4.

The record conclusively shows that the employer-employee relationship was never terminated in accordance with the written agreements. The written agreement of March 20, 1928, contained the following rule (R. 5): "Men off on account of sickness will be held in their proper places on the seniority roster and names which have been removed from the roster be restored." It was undisputed that respondent took petitioner out of service only temporarily, after the establishment of the employer-employee relationship on February 14, 1929, either on the ground of reduction of forces, on account of slack business, or on account of alleged physical disability. None of these temporary lay-offs affected petitioner's seniority rights under the rules of the union agreements, (R. 3, 4, 5); and under Section 228(d) of the Railroad Retirement Act of 1937 (Vol. 10A, Fed. Code Annotated): Article 40 of the rules of the written agreements required firemen to report to actual service within thirty days after being recalled (R. 4). The evidence was undisputed that petitioner returned to service the very next day following his recall in 1935. There is nothing in the record to show that the employer-employee relationship between petitioner and respondent has ever been terminated in accordance with the provisions of the agreements, which clearly formed part of petitioner's employment contract. It was not until September 30, 1940, and October 4, 1940, that Mr. Ray, respondent's then general manager, notified petitioner that his predecessor had disapproved petitioner's application, referring to Mr. Main's action in 1935, when no application for employment by petitioner was pending. It is our contention that these letters did not terminate the relationship of employer-employee between petitioner and respondent as that relationship could only be terminated in accordance

with the provisions of the written agreements, after that relationship was once established. It was not until 1940 that petitioner had any hint that respondent questioned his status as a regular fireman of respondent. Up to that time petitioner assumed he was only out of active service on account of a claimed transitory physical disability.

The Circuit Court of Appeals and the District Court failed to decide whether or not the employer-employee relationship was ever terminated in accordance with the provisions of the written agreements. The judgment of the Circuit Court and the judgment of the District Court were squarely upon the ground that the employer-employee relationship *was never created in the beginning,* solely because the general manager never approved the written application for employment upon the face thereof. It is of vital importance that this court determine that the provisions of the working agreements, authorized by the Railway Labor Act, Vol. 10A, Fed. Code Annotated, Title 45, 151(d), are part of the contract of employment after the employer-employee relationship is created.

The District Court, in its memorandum filed June 5, 1945, on a motion to strike, held as follows:

> "I feel, however, that where a regular employee with seniority rights is laid off for sickness and a medical examination is required before he can return to work that *there is a duty on the part of the employer, arising out of the seniority contract,* to afford the opportunity for such examination within a reasonable time after the employee reports himself recovered. Otherwise, an employee's seniority rights would be subject to violation with impunity * * * Here, then if plaintiff was a regular employee the failure of the defendant to afford him an examination was a violation of his seniority rights, or, put in another way, was a breach of that part of his employment contract relating to seniority."

The evidence conclusively showed that respondent wholly failed to afford petitioner the opportunity for additional medical examinations at reasonable times, to determine his physical fitness to be returned to active service, by reason whereof petitioner's seniority rights were violated and petitioner suffered damage. It is apparent from the District Court's memorandum that petitioner would have been restored to his seniority rights by the District Court had it not been for the District Court's erroneous finding that petitioner never became an employee of respondent as is hereinbefore fully discussed.

5.

Neither the Court of Appeals nor the District Court determined the legal effect of the letter written by J. F. Hazel, respondent's superintendent, to petitioner on March 7, 1935, hereinbefore referred to and fully set forth herein (R. 30). This letter speaks for itself and unequivocally assures petitioner that he will be returned to service if his physical condition can be cleared and he can pass the physical examination required by the company. The letter further assured petitioner that he had been taken out of service solely "because of his physical condition." This letter (Exhibit 8), was offered in evidence by petitioner (R. 141). Respondent objected on the ground that Exhibit 8 was only a letter of recommendation and did not bind respondent to anything. (R. 142.) The District Court, in its findings of fact, (R. 15), attached no significance to the legal effect of Exhibit 8 for the alleged reason that there was no evidence that the general manager had knowledge of the writing of this letter. The only testimony in the record as to the authority of J. F. Hazel to write this letter was the testimony of respondent's official, Jedediah Weeks, who succeeded J. F. Hazel as respondent's official

in charge of hiring firemen in Lang Yard in 1933, and who admittedly exercised that authority with the approval of respondent until March, 1935. Mr. Weeks testified that he succeeded to all the authority formerly invested in Mr. Hazel and that had Mr. Weeks written Exhibit 8 he would have had "the authority of the management behind me." (R. 123.) Mr. Hazel, who died before the trial, represented respondent in signing the working agreements with the firemen, dated November 15, 1924 (R. 5). The testimony is uncontradicted that both Mr. Hazel and Mr. Weeks had authority to hire firemen in Lang Yard. No evidence whatever was introduced by respondent questioning the authority of J. F. Hazel to bind respondent to the terms and conditions of Exhibit 8, (R. 30).

The evidence was uncontradicted that petitioner made every possible effort, from March, 1935 to September, 1940, to secure additional medical examinations by respondent to determine his then physical fitness to be returned to active duty. The evidence is likewise uncontradicted that respondent failed and refused to afford petitioner the opportunity for such examinations. The evidence is likewise uncontradicted that petitioner was never discharged by respondent. The evidence is therefore uncontradicted that petitioner was out of the service solely because of his physical condition from March, 1935 to September, 1940, during which period respondent failed to afford petitioner a medical examination or an opportunity therefor. There was no evidence that charges of any kind were ever made against petitioner by respondent, or that the employer-employee relationship was ever terminated in accordance with the provisions of the working agreements.

6.

In *J. I. Case Co. vs. National Labor Relations Board,* 321 U. S. 332, 88 L. Ed. 762 (1944) the U. S. Supreme Court held that collective bargaining between an employer and a union *does not necessarily* result in a contract of employment. This case does not hold, however, that working agreements, such as Exhibits 1, 2 and 3 in this case, do not control the seniority rights of railroad employees under the Federal Railroad Retirement Act of 1937, Section 228(a) (D), of the Railroad Retirement Act of 1937 (10A Fed. Code Ann., R. 223), effective June 24, 1937, which provides in part as follows:

> "An individual *is in the employment relation to an employer* if he is *on furlough,* subject to call for service within or outside the United States and ready and willing to serve, or *on leave of absence, or absent on account of sickness or disability;* all in accordance with the established rules and practices in effect on the employer."

Unless the seniority rights of railroad employees are protected by the working agreements, then a railroad employee could be discharged without cause and the employee's seniority would be valueless.

The case of *Yazoo and M. V. R. Co. vs. Webb,* 64 F. (2d) 902, decided in 1933, relied on by respondent in the lower court, is an authority in favor of petitioner. It is not petitioner's claim that the railroad agreements, (Exhibits 1, 2 and 3), establish a contract between respondent and petitioner. It is petitioner's contention that after the employer-employee relationship is established that the rules of the working agreement control the rights of the parties.

As a matter of law the written agreements definitely became a part of petitioner's contract of employment. The

lower court correctly stated the law applicable to this important issue in its memorandum of March 10, 1945, in which the lower court stated:

> *"As I understand the law, the (petitioner) would have a right of action for violation of seniority rights* if being employed by the (respondent) he was laid off and during his layoff period the (appellee) employed a fireman junior in rank to him. *This is so, because the Union agreement sets up such a plan and becomes the basis for any individual contract of employment. Yazoo and M. V. R. Co. vs. Webb,* 64 Fed. (2d) 902 (C. C. A. 5); *Illinois Central R. R. Co. vs. Moore,* 112 Fed. (2d) 959 (C. C. A.)."

The written agreements definitely provide that an employee cannot be discharged or removed from service except in accordance with the terms and provisions of the written agreements. Employees can only be discharged for cause, and after affording the employee the opportunity of a hearing, as provided in the agreements (Exhibit 1, Art. 49). The agreements, therefore, do make definite provision for the continued employment of employees so that their seniority rights cannot be violated with impunity. The Railroad Retirement Act would be of no value whatever to railroad employees unless seniority rights were protected in accordance with the working agreements.

Because of the provisions of the Railroad Retirement Act the seniority rights of a railroad employee has become a thing of great value to the employee. It is likewise valuable to the railroad companies in that it enables the railroads to keep in their employment high-grade men. If an employee could be discharged at the whim or caprice of the railroad, as claimed by respondent, then an employee's seniority rights could be violated with impunity by the railroad company. It is absolutely necessary that the working agreements be strictly followed by the Railroad

Company to preserve the seniority rights of its employees. Of necessity the agreements do become an integral part of the contract of employment.

The working agreements of 1924 and 1928 (Appellant's Exhibits 1 and 2), conclusively show on their face that the agreements are between the Railroad Company AND ALL OF ITS ENGINEERS, FIREMEN AND HOSTLERS, *as represented by the Union.* The Union representative signed as the accredited representative of all the employees, and for the benefit of all the employees designated therein. These agreements speak for themselves. The plain terms of the agreements themselves can have no other construction or interpretation.

Paragraph 2 of the syllabus in *Baron vs. Kurn, Trustee,* 349 Mo. 1202, referred to by the lower court in its memorandum of March 10, 1945, is as follows:

> "2. An employee may acquire rights under a labor union's contract with his employer independent of his individual contract of employment."

In the opinion of the court in *Baron vs. Kurn,* discussed in 142 A. L. R. 789, the court states:

> "The railway does not question the right of individual yardmen generally to enforce the provisions of the Yardmen's Schedule, and the issues do not embrace any discussion of the theory or theories underlying such right. *Courts of this and other states have advanced, among others, the reasoning that the employee may enforce the contract as a third party for whose benefit it was made. McCoy vs. St. Joseph Belt Ry. Co.,* 229 Mo. App. 506, 514, 77 S. W. (2d) 174, 180 (2, 3); *Hall vs. St. Louis-S. F. Ry. Co.,* 224 Mo. App. 431, 435, 28 S. W. (2d) 687, 689 (3). Consult Annotations, 95 A. L. R. 10, 41; 81 A. L. R. 1271, 1302, 2 Williston on Contracts, p. 1099, Sec. 378A. If language found in *Burnetta vs. Marceline Coal Co.,* Div. II, 1904, 180 Mo. 241, 250, 79 S. W. 136, 139, is to be construed that an employee may

not acquire rights under a labor union contract with his employer independent of his individual contract of employment, we think it *out of line with the trend of modern authority and should not be longer followed in that respect.*"

In *Dooley vs. Lehigh Valley R. Co.*, 21 Atl. Rep. 2nd, page 334, paragraphs 1 and 3 of the syllabus are as follows:

"1. A contract between employer and union not only enters into individual contracts, but circumscribes the rights of employer and members of union with respect to making individual contracts and creates legal rights and duties which are independent of particular hirings."

"3. 'Seniority' represents in the highest degree the right to work, and by seniority the oldest man in point of service, ability and fitness for the job being sufficient, is given choice of jobs, is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service."

This case includes a full and complete discussion of the rights of an employee to maintain an action against the railroad for any violation of his seniority rights and discusses in detail many decisions in reference thereto. In its opinion at the bottom of page 337 and the top of page 338 the court states as follows:

"The contract between employer and union not only enters into the individual contract, but it circumscribes the rights of the employer and the members of the union with respect to making individual contracts of employment. It creates legal rights and duties which are independent of particular hirings. The development of the law on the subject is treated in 95 A. L. R. 10."

One of the leading cases on this subject is the case of *Illinois Central R. R. vs. Moore,* 112 Fed. (2d) 959 and C. C. A. 5, referred to by the lower court in its memorandum of March 10, 1945. This is one of the latest cases which discusses the nature of the employee's contract in its relation to the written agreements. Paragraph 14 of the syllabus in that case is as follows:

> "A railroad which had contract with trainmen's union could not discharge switchman at will on *grounds that employment was for no definite time and that employee might quit at any time and that to cut off right to discharge at will a clear stipulation was required, where contract contained stipulation that cause of discharge should be stated and hearing given on demand, and, if 'found to be unjust, yardmen and switchtenders shall be reinstated and paid for all time lost,' which implied that discharge was not to be at employer's will but only for just cause of which railroad officers were not the sole or final judges. Railway Labor Act, as amended, T. 45 U. S. C. A. 151, et seq.*"

From the foregoing it is apparent that the signing of an application for employment by petitioner was merely the preliminary step utilized by respondent to secure information as to petitioner's past record and qualifications. In no sense could it constitute the contract of employment. *The actual contract of employment of necessity had to be in conformity with the written agreements then existing between respondent and its firemen.* No provision whatever appears in any of the agreements requiring firemen to sign an application form. *There is no provision in any of the agreements, which have been introduced in evidence, requiring respondent's approval of an application for employment.* In other words, the requiring of an application was merely for the convenience of respondent. The respondent did not have to put petitioner to work merely

because petitioner signed an application. *There are no provisions in any of the agreements providing for temporary employment.* After petitioner passed the physical examination there was still no obligation whatever upon respondent to put petitioner to work. Respondent had the right to check petitioner's former record of employment and his qualifications and to decide whether or not to put petitioner to work.

The agreement of November 15, 1924, made specific provisions as to the means by which this relationship, once established, could be terminated by action of the respondent. Article 49 of the agreement of November 15, 1924, provided that firemen will not be disciplined *or dismissed* (except for intoxication or insubordination) *until after investigation* (Exhibit 1). This Article also provides for a hearing in the event charges are preferred against the employee. The undisputed testimony is that the employer-employee relationship was created in accordance with the written agreements and that respondent never terminated that relationship, and never attempted to discipline or dismiss petitioner or prefer charges of any kind against him. Petitioner was merely taken out of active service, temporarily, in 1935 on account of his then physical condition.

PRAYER

Wherefore, petitioner prays that a writ of *certiorari* be issued by this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that said opinion and judgment of the United States Circuit Court of Appeals for the Sixth Circuit in said cause of *John E. Gibbons, petitioner herein, vs. The Detroit and Toledo Shore Line Railroad Company, respondent herein,* Cause No. 10636, be reviewed by this court as provided by law, and upon such review said judgment be reversed, and that petitioner have such other relief as to this court may seem appropriate.

CHARLES H. BRADY,
810 Edison Building,
Toledo, Ohio,
Attorney for Petitioner.

APPENDIX A

MEMORANDUM OPINION OF DISTRICT COURT

(Filed March 25, 1947)

Kloeb, J.:

In this case, plaintiff seeks to recover damages in the amount of $18,220.00 for breach of seniority rights. He claims that he was employed by the defendant in 1929, and worked there intermittently until 1935, when he was laid off. He claims that, shortly thereafter, he was ready and able to return to work, but that the defendant employed other firemen junior to him in seniority in violation of his rights and to his damage in the amount previously stated.

As the court indicated in its Memorandum Opinion of March 13, 1945, a cause of action based on violation of seniority rights presupposes the existence of the employer-employee relationship, and a temporary layoff in violation of seniority rights. "The evidence in this case conclusively shows, in the court's opinion, that the *plaintiff never became an employee of the defendant.* There is no question that he made an application for employment to the defendant in February of 1929, which application showed, on its face, that the employment *was to be only temporary until the approval of the application was endorsed thereon* by the general manager of the defendant." It cannot be disputed that such approval was never endorsed on the application. Plaintiff alleged in his complaint that the defendant, in writing, accepted his application for employment, but at the trial he offered no evidence whatever to substantiate this contention. Plaintiff argues at some length that the approval of the application could be waived and was, in fact, waived by the defendant's conduct in this case. Without expressing, or intending to express, any opinion as to the possibility of the defendant's waiving

such approval, the court is of the opinion that *there is no* evidence here to substantiate such a waiver should it be assumed that such were possible.

"Plaintiff did do some work for the defendant, but the court is convinced that he never became an employee of the defendant, but was merely allowed to work on a temporary or probationary basis *until such time as his application could be approved. The evidence clearly shows that, not only was his application never approved, but that, on the contrary, it was specifically disapproved by the general manager of the defendant.*"

Under such circumstances, the plaintiff has failed to prove his right to damages, and judgment must be rendered for the defendant.

Defendant may have ten (10) days within which to file Findings of Fact and Conclusions of Law drawn in accordance with this opinion, and plaintiff may have five (5) days thereafter within which to file any corrections or suggested additions thereto.

Frank L. Kloeb,
United States District Judge.

Toledo, Ohio, March 25, 1947. R. 13, 14.

APPENDIX B

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 15, 1948)

Before Hicks, Chief Judge, and Allen and McAllister, Circuit Judges.

Per Curiam. In this case appellant sought damages against the appellee for $18,220 for breach of seniority rights, in a petition which was dismissed by the District Court. The appellant had worked as fireman for appellee in 1929 and 1935 for approximately 47 days in the aggregate.

The District Court found that under the terms of appellant's application for employment and other evidence in the record, appellant never became an employee of the appellee, but was allowed to work on a temporary or probationary basis; hence, the court held that appellant had no seniority rights and that his right to damages had not been proved.

While other features were presented in the case upon which the District Court did not rule, we cannot say that its findings upon this phase of the case are unsupported by the record. It follows that the judgment must be, and it hereby is, affirmed.

Allen, Circuit Judge, concurring. I think the judgment should be affirmed, not on the ground stated, but on the ground pleaded in the answer and clearly sustained by the record, that the action brought in 1944, based upon an alleged breach of oral contract occurring in 1935, is clearly barred by Section 11222, General Code of Ohio. (R. 236.)

FILE COPY

FILED
OCT 4 1949
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES H. BRADY,
810 Edison Bldg.,
Toledo, Ohio,
Attorney for Petitioner

IN THE

Supreme Court of the United States

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES H. BRADY,
810 Edison Bldg.,
Toledo, Ohio,
Attorney for Petitioner

INDEX

Page

Grounds on Which Jurisdiction Is Sought To Be Involved 8

Respondent's Contention that "Petitioner's Employment Was Only Temporary Because His Application For Employment Was Not Approved By the General Manager of the Respondent," Is Clearly Erroneous. (Respondent's Brief, page 6.) 10

Respondent's Claim That "The Requirement of Approval By the General Manager Was Not Waived By the Respondent Under All the Evidence in This Case," Is Not Supported By the Record 12

Conclusion 14

Exhibit B 15

IN THE

Supreme Court of the United States

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, in its brief in opposition to the allowance of petitioner's petition for a *Writ of Certiorari,* again relies principally upon its contention that "petitioner's application for employment, which he read, *showed on its face* that it was to be approved by the General Manager of the respondent." (Respondent's brief, page 14.) For the convenience of this Court we are incorporating herein a photostatic copy of petitioner's application for employment, reduced in size, which clearly shows the errors of the lower courts in their interpretation and construction of this application. (Exhibit "B," page 15 herein.)

As shown by the opinion of the Circuit Court of Appeals, fully set forth on page 34 of the petition for a *Writ of Certiorari*, Circuit Judge Allen did not concur in the affirmance of the trial court's judgment "on the ground stated" in the opinion, but upon a jurisdictional ground not theretofore urged in the District Court or in the Circuit Court of Appeals. *Judge Allen definitely did not agree with the construction and interpretation placed upon the written application for employment by the lower court.*

The record conclusively shows that the judgments of both lower courts were based exclusively upon their construction of the written application for employment, and not upon their consideration of any other evidence.

The decisions of both lower courts *did not involve any consideration of the oral evidence*, but were based exclusively upon their construction and interpretation of the written application for employment; their construction of the legal effect of the admitted publication by respondent of four consecutive Seniority Rosters, containing petitioner's name, over a period of two years from February 14, 1929; and their construction of the legal effect of Exhibit 8 (R. 30), J. F. Hazel's letter to petitioner of March 7, 1935, assuring petitioner that he had been taken out of service "because of his physical condition," and promising petitioner that if his physical condition could be cleared that he "can and will be returned to service."

A determination by this Court of the important federal questions presented in petitioner's petition for a *Writ of Certiorari* does not involve a consideration of any disputed fact. The four (4) questions presented in the petition for the Writ involve only the correct legal interpretation

and construction to be placed upon written instruments, received in evidence. (Petition for Writ, pages 13, 14.) Respondent, throughout its brief, states that the lower courts considered oral evidence in determining the questions here presented. We submit that the opinion of the District Court (Petition for Writ, pages 32, 33); the findings of fact and conclusions of law of the District Court (R. 14, 15, 16); and the opinion of the Circuit Court of Appeals (page 34, Petition for Writ); show conclusively that the judgments of both lower courts were based exclusively upon their erroneous interpretation and construction of petitioner's written application for employment, and were not based upon any consideration of other evidence. Both lower courts held specifically that the written application *"showed on its face"* that petitioner's employment was only temporary until the approval of the General Manager was endorsed thereon in writing. This interpretation was wholly improper and erroneous.

An examination of the photostat of petitioner's original application for employment, (page 15 herein), demonstrates that both lower courts have placed an erroneous interpretation upon its legal effect. The application in fact *shows on its face* as follows:

1. The fine print, immediately above respondent's signature, ends with the word "approved." The application, above respondent's signature, in no place refers to the claimed requirement of written approval *"by the general manager."* The application does not state that the approval of the application by the General Manager is a condition precedent to petitioner becoming a regular employee.

2. The printing by respondent of certain blank lines, below respondent's signature, for the obvious convenience of the respondent's General Manager, certainly does not constitute a legal requirement of written approval by the General Manager. The blanks below petitioner's signature are not part of the application, and are not referred to in the application itself.

3. By no grammatical construction of the written application can it be said that the printed application *on its face* required the written approval of the General Manager.

4. Unless the words "by the General Manager" are added to and made a part of the fine print, immediately above petitioner's signature, the printed application does not *on its face* require the written approval of the General Manager before the applicant becomes a regular employee. The fine print ends with the word "approved." The approval may be by publication of rosters or by any other customary method. The approval need not be by the General Manager on the face of the application *for the application does not so state.* There is a period after the word "approved" in the fine print.

5. The application, as shown by the photostat, was never "specifically disapproved" by the General Manager. The evidence was uncontradicted that the original application of petitioner was never sent to the General Manager for his approval or disapproval. (R. 179.) How could the general manager approve or disapprove the application if it was never sent to him for action?

6. As a matter of law the application was approved by respondent by the publication by respondent of petitioner's name on four consecutive seniority rosters, im-

mediately after petitioner started to work for respondent, as required by the rules of working agreement (Articles 40 and 52, R. 4).

Unless railroad employees can rely upon published seniority rosters as proof that they have been accepted as regular employees by such railroads, no employee of a common carrier will ever know whether his application for employment has been accepted or not. As in this case after a period of from six to eleven years, depending on when respondent claims petitioner's application was specifically disapproved by the then General Manager of respondent, (from March 1935 to 1940), respondent has asserted that petitioner never became an employee on February 14, 1929, or thereafter, because its new General Manager, either in March 1935 or in 1940, disapproved the written application made on February 14, 1929. This asserted claim is made in face of respondent's admissions in the evidence, (R. 180), and on page 7 of respondent's brief, that sixty (60) days is ample time to check on applicant's qualifications. The evidence shows nothing about sixty (60) days "in the aggregate," being required to check qualifications of petitioner. The evidence adduced by respondent, (R. 180, 181) shows conclusively that from thirty (30) to sixty (60) days is ample time to check such qualifications. Furthermore, respondent admitted without reservation that petitioner would have worked regularly throughout the remainder of the year 1929 had it not been for "slack business," and that "there wasn't any work for him (meaning petitioner) from June to December, 1929." (R. 200.) There was no evidence of any investigation by respondent of petitioner's qualifications after March 20, 1929. In fact, respondent admitted that its investigation of petitioner's qualifications ended on March 20, 1929. (R. 193.)

No further investigation by respondent of petitioner's qualifications was pending when respondent, after petitioner had worked regularly as a fireman for respondent from February 14, 1929 to the end of March, 1929, earning $112.64 in February, 1929, and $86.42 and $9.79 to the end of March, 1929, as testified by E. L. Ray, respondent's general manager at the time of the trial; no further investigation of petitioner's qualifications was pending when respondent furloughed petitioner in March, 1929 (R. 82), and admittedly gave petitioner a written leave of absence in May, 1929, (R. 198, Exhibit 23), in accordance with the rules of the working agreement (Article 48, R. 4); no further investigation by respondent of petitioner's qualifications was pending when respondent admittedly published a seniority list of its regular firemen on or about August 1, 1929, containing petitioner's name with the effective date of his seniority as of February 14, 1929, (R. 181, Exhibit 13); no further investigation of petitioner's qualifications was pending when respondent recalled petitioner to active service as a fireman during the last half of December, 1929, when petitioner admittedly earned $23.72 as shown by the testimony of E. L. Ray, respondent's general manager, (R. 216); no further investigation of petitioner's qualifications was pending when respondent admittedly published seniority lists of its regular firemen on February 1, 1930, August 1, 1930 and February 1, 1931, containing petitioner's name as a regular fireman of respondent with the effective date of his seniority as of February 14, 1929. (Exhibits 14, 15 and 21); no investigation of petitioner's qualifications was pending when petitioner was recalled to active service as a fireman on January 29, 1935 by respondent, (R. 83, 84); and no investigation of

petitioner's qualifications was pending when respondent's superintendent, J. F. Hazel, who hired petitioner as a fireman on February 14, 1929, and who again had charge of hiring firemen for respondent on March 7, 1935, gave petitioner a letter, (Exhibit 8, R. 30), assuring petitioner that he had been taken out of service "because of his physical condition," and further assuring petitioner that he "can and will be returned to service" if his physical condition "can be cleared and he can pass the physical examination required by the company."

The evidence is therefore undisputed that petitioner was out of service from December, 1929 to January 29, 1935, when he was recalled to active duty, entirely because of reduction in force and "slack business," (R. 184, 200), and did not lose his seniority under the rules of the working agreements, (Article 40, 48, and the supplement of March 20, 1928, R. 4, 5). No new application for employment by petitioner was pending either in 1935 or 1940, when respondent asserts the then general manager disapproved petitioner's original written application for employment.

Respondent is seeking to establish as a principle that the railroad, in this case, can arbitrarily take a man out of service without complying with the rules of the written agreement, by merely asserting that since the employee was never employed, because the general manager never approved its original application, that such employee has no seniority rights and is not protected by the rules of the written agreements. Respondent contends that in 1935, and again in 1940, its then general manager, more than six years after the original employment on February 14, 1929, specifically disapproved the original written application,

which admittedly was never even sent to the general manager for approval or disapproval. The mere statement of the incongruous situation that has resulted from the decisions of the lower courts in this case shows the necessity of a review by this Court. State laws do not control or define the rights of interstate railroad employees. The questions here presented are questions involving the basic rights of all railroad employees and are therefore federal questions of great importance.

GROUNDS ON WHICH JURISDICTION IS SOUGHT TO BE INVOKED

On page 3 of its brief respondent contends that "the fact is that this case does not involve any dispute as to any principle," but turns upon the evidence of this case alone. We submit that the decisions of the lower courts in this case do involve "principles" of great public interest, especially to every employee of every common carrier in the United States, whose seniority rights are seriously jeopardized thereby.

It certainly is a principle of great public interest which should be decided by this Court as to whether or not a common carrier can successfully assert, after a period of from six to eleven years, that an employee never became a regular employee because the General Manager of such common carrier never approved in writing the original written application of such employee. If the decisions of the lower courts are permitted to stand then common carriers can with impunity at any time terminate an established employer-employee relationship by merely asserting that some railroad official has not approved in writing the original

application for employment. The assurance of continued employment of all railroad employees in accordance with their seniority is jeopardized by the decisions of the lower courts.

It certainly is a "principle" of great public interest and of vital importance to every railroad employee as to whether or not railroads can disregard the security afforded to all railroad employees by the publication of seniority rosters, published under the written working agreements with their employees, by merely asserting that the general manager, or some other high official of such individual railroad, has not personally approved the publication of such rosters. Surely, railroads must be bound by the publication of such rosters. It should never be necessary in a given case for an employee to be compelled to prove that the officials of such railroad had personally approved such rosters. If the rosters are published in accordance with the provisions of the working agreements then common carriers should be bound thereby. Otherwise seniority rosters would be valueless to railroad employees, as employment could be terminated by carriers at the whim or caprice of railroad officials with irreparable injury to the seniority rights of all affected employees.

It is a matter of the utmost importance to every railroad employee to secure a reversal of the decisions of the lower courts, holding that there can be no waiver or estoppel asserted against a common carrier, by reason of the admitted publications of its seniority rosters, under the written agreements with such employees, unless it can also be shown that the officials of such railroad personally approved the publication of such rosters. In this case the lower courts specifically held that respondent was not

bound by the admitted publications of respondent's seniority rosters of its firemen, unless petitioner showed that respondent's general manager approved such publications. How can a common carrier successfully carry on its diversified business if the general manager, personally, is obligated to personally and specifically approve the correctness of all its seniority rosters, published under the written agreements, in order to bind such carrier by such publications. Respondent offered no evidence that seniority rosters were ever sent to the general manager for approval or disapproval. In this case respondent should be bound by its admitted publication of four consecutive seniority rosters, containing petitioner's name as a regular fireman, with the effective date of his seniority as of February 14, 1929, whether such rosters were ever presented to the general manager for his personal approval or not. The publication of such rosters, under the rules of the written agreements, should bind respondent when published in the customary course of business.

Respondent's Contention That "Petitioner's Employment Was Only Temporary Because His Application for Employment Was Not Approved By the General Manager of the Respondent," Is Clearly Erroneous. (Respondent's Brief, page 6.)

We will not discuss the authorities referred to in respondent's brief as the cases cited, and the rule stated in Volume 1, Section 61, Restatement of the Law of Contracts, (pages 6, 7 of respondent's brief), do not apply to the undisputed factual situation presented in this case. We submit that the federal questions here presented have never heretofore been presented to or decided by any Court of record, either State or Federal.

We fully agree with respondent's contention on page 7 of its brief that railroads should have ample time to check the past records and ability of applicants to perform satisfactory service. It is undisputed in this case that petitioner's services as a fireman were wholly satisfactory (Exhibit 23, R. 198 to 200). No charges or claims of incompetency against petitioner were ever made by respondent or even suggested in the record. On the contrary the evidence is undisputed that petitioner's services were highly satisfactory. (Exhibit 23, R. 200; Exhibit 8, R. 30.)

As definitely established by Exhibit 8, (R. 30), petitioner was temporarily taken out of active service entirely because of a transitory physical disability, consisting of a trace of albumen in petitioner's urine. It was solely because of this temporary physical disability that petitioner was not returned to active service in 1935 when J. P. Main, respondent's general manager, wrote J. F. Hazel a letter, respondent's Exhibit "BB," dated March 15, 1935, advising Mr. Hazel that on account of petitioner's then condition of health he, Mr. Main, could not then approve petitioner's application for "re-employment." It is undisputed that at that time no application for employment, written or otherwise, was pending, as petitioner had merely been recalled to active service by letter from respondent on January 29, 1935, (R. 83, 84); and that after thereupon admittedly working for respondent as a fireman in Lang Yard, Toledo, Ohio, until February 18, 1935, J. F. Hazel, who again had charge of hiring firemen in Lang Yard, and who originally hired petitioner on February 14, 1929, wrote Dr. Burkholder, (Exhibit 18) to examine petitioner "who has *returned* to service as a fireman." This examination was merely a routine checkup. Petitioner had admittedly already passed the required original physical ex-

amination by Dr. Briggs, respondent's medical examiner on February 14, 1929, on his original application. No application for employment was pending in March, 1935. Petitioner had merely been recalled to active service after being out of active duty from December, 1929 until February 29, 1935, entirely by reason of reduction in force and slack business. (R. 82, 198, 200.) Respondent is now seeking to take advantage of its claimed requirement of approval by the general manager, on the face of the original application for employment, to defeat petitioner's just claims. The photostat of the application shows no disapproval by the general manager on the face of the application. In fact the application was never sent to the general manager for any action.

The blank space below petitioner's signature "Recommended for employment as ..... at ....." was never filled in by Mr. Hazel or Mr. Weeks, who had charge of hiring firemen at Lang Yard from 1929 to 1935 at different periods. However, it is undisputed that Mr. Hazel and Mr. Weeks both recommended petitioner for continued employment, as shown by all Exhibits and especially as shown by Exhibit 8, (R. 30), written by Mr. Hazel on March 7, 1935.

Respondent's Claim That "The Requirement of Approval By the General Manager Was Not Waived by the Respondent Under All the Evidence in This Case," Is Not Supported by the Record.

The cases cited by respondent, under this caption, are not in point. We have heretofore fully discussed the lower courts' erroneous interpretation of the original application, which was merely a memorandum form, not even specifically referring to firemen or engineers, and was clearly

used as a matter of convenience by respondent to jot down information as to applicants. The application was in no sense a contract nor was it intended as such. The claimed requirement of approval by the general manager, as a matter of contract, is not borne out by a simple grammatical construction of the application as we have pointed out.

Respondent's claim that Mr. Hazel's letter to petitioner of March 7, 1935, (R. 30), does not bind the respondent by its terms, as found by the trial court, (R. 158, 159), is erroneous. In no sense was Mr. Hazel's letter to petitioner of March 7, 1935 (Exhibit 8), a letter of recommendation. Who ever heard of a letter of recommendation calling attention to the bearer's physical disability, saying nothing about his service being satisfactory, and then assuring petitioner in no uncertain terms that "If this condition can be cleared and he can pass the physical examination required by the company, he can and will be *returned* to service." The letter speaks for itself. Mr. Hazel, who wrote the letter, admittedly hired petitioner on February 14, 1929, and again had charge of hiring firemen for respondent on March 7, 1935, when he wrote Exhibit 8, and gave it to petitioner. Mr. Hazel admittedly not only had charge of hiring firemen for respondent in Lang Yard both in 1929 and again in 1935, but he had the authority of respondent to sign the written agreements of 1925 and 1928, for and on behalf of respondent, binding respondent to the very obligations contained therein which are pertinent and controlling as to the issues here involved, (R. 3, 4, 5). Mr. Hazel's authority to bind respondent to the terms of Exhibit 8, (R. 30), cannot be questioned. Mr. Hazel was dead at the time of the trial. However, Mr. Weeks, the only official of respondent who testified on the subject, testified

on cross-examination that when he performed Mr. Hazel's duties he had the authority of respondent to write such a letter (R. 122, 123). No evidence whatever was offered by respondent to dispute the authority of Mr. Hazel to bind respondent to the terms of Exhibit 8, or to require that the general manager approve Exhibit 8, before respondent could be bound thereby. *At least it cannot be disputed that Exhibit 8 clearly defines petitioner's status with respondent as a regular employee who is temporarily out of service because of his physical condition.*

CONCLUSION

Under the circumstances which we have called to the attention of the Court we submit that the Federal questions here presented involve principles of the utmost importance to all railroad employees; that these questions have not heretofore been presented to or decided by this Court; and that petitioner's petition for a *Writ of Certiorari* should be granted to determine the important Federal questions here presented so that the seniority rights of all railroad employees will not be jeopardized or destroyed.

Respectfully submitted,

CHARLES H. BRADY,
810 Edison Building,
Toledo, Ohio,
Attorney for Petitioner.

...TROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

Application for Employment.

Conditions

Applicants for employment must be able to read and write, and must be under 40 years of age

A Candidate as Brakeman, Switchman, Policeman, Porter, Laborer, etc., must be generally intelligent, free from all bodily complaints and of a strong constitution. The Candidate must produce testimonials of character from his last employer and also from some person of responsibility and position by whom he is personally known; these with the recommendation will be submitted, on the Candidate appearing for examination, and it will be decided whether he be a proper person to be appointed.

A Candidate as Brakeman, Switchman, or other position in train service, must be 21 and not exceed 40 years of age

A Candidate as Policeman, Porter, Laborer, etc., must be 19 and not exceed 40 years of age

The Company reserves the right to deduct from the pay of any person employed, any fine imposed for neglect of duty or otherwise

Appointments are made on the distinct understanding, that the parties hold themselves in readiness to proceed to duty immediately on being summoned, and that they reside wherever required.

Applicants must fill out the form below in their own handwriting.

State your Christian and Surname in full. John Edward Gibbons

---

State fully your railroad experience- how employed during the last five years—name and address of last employer and reasons for leaving Attach testimonials. Ford R.R. River Rouge plant

Laid off Oct 1926 to Nov 1928. Laid off

Since then, farming.

State date and place of birth Sault Ste Marie, Mich. May 26 - 1902

Have you any physical defects unfitting you for employment on a railroad? Defects. None.

defective sight. None. varicose veins. None. or rupture. None.

State your height 5' 10½ weight. 160 color of eyes. Hazel-B color of hair. Dark Brown

Are you married? Yes. ? If married, what family?

Name of Minister or Priest Mrs Sarah Gibbons.

Address 2041 St John St - Regina Sask.

If put to work, I understand that my employment is only temporary until this application is approved.

Signature John Edward Gibbons

Date 2/14/29 Address

Recommended for employment as

At Lyl & #1

Approved 2/22/29 Date

General Manager

EXHIBIT'S EXHIBIT

FOR IDENTIFICATION

13

Office - Supreme Court, U. S.
FILED
AUG 29 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER A. EVERSMAN,
WILLIAM H. BLACK, JR.,
WILLIAMS AND EVERSMAN,
1600 Ohio Building,
Toledo, Ohio.

Attorneys for Respondent.

IN THE

Supreme Court of the United States

October Term, 1949

No. 152

JOHN E. GIBBONS,

Petitioner.

vs.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER A. EVERSMAN,
WILLIAM H. BLACK, JR.,
WILLIAMS AND EVERSMAN,
1600 Ohio Building,
Toledo, Ohio.

Attorneys for Respondent.

INDEX

	Page
Opinion of the Court Below	1
Grounds on Which Jurisdiction Is Sought To Be Invoked	2
Statement of the Case	3
Argument and Summary of Argument	5
1. The Petitioner's Employment Was Only Temporary Because His Application for Employment Was Not Approved By the General Manager of the Respondent	6
2. The Requirement of Approval By the General Manager Was Not Waived By the Respondent Under All the Evidence in This Case	8
Conclusion	14

Table of Cases and Authorities

Bennecke vs. Connecticut Mutual Life Insurance Co., 105 U. S. 355, 359, 26 L. Ed. 990, 992 (1882)	9
Brant vs. Virginia Coal & Iron Co., 93 U. S. 326, 335, 23 L. Ed. 927, 929 (1876)	12
C. R. I. & P. Ry. Co. vs. Sawyer, 176 Okla. 446, 56 P. (2d) 418 (1936)	10
Case Company, J. I., vs. National Labor Relations Board, 321 U. S. 332, 88 L. Ed. 762, (1944)	2
General Talking Pictures Corp. vs. Western Electric Co., et al., 304 U. S. 175, 178, 82 L. Ed. 1273, 1275 (1938)	3
Restatement of the Law of Contracts, Vol. I, Section 61	6
Walling vs. Nashville, C. & St. L. Ry., 155 F. (2d) 1016 (C. C. A. 6, 1946)	7
White Co. vs. Trans. Co., 131 O. S. 190	9

IN THE

Supreme Court of the United States

October Term, 1949

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION OF THE COURT BELOW

The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, filed December 15, 1948, is reported in 171 F. (2d) 287.

GROUNDS ON WHICH JURISDICTION IS SOUGHT TO BE INVOKED

The petitioner's statement of the grounds upon which the jurisdiction of this court is invoked merely repeats the language of Rule 38, 5(b). The petitioner asserts that the Court of Appeals decided important questions of federal law which should be settled by this court and he cites the definition of the term "employee" in the Railway Labor Act (45 U. S. C. A., Sec. 151). However, the instant case is not one under that Act, so the definition is of only passing interest.

Again, petitioner quotes from the Railroad Retirement Act (45 U. S. C. A., Sec. 228a (d)) in two places in his petition (pp. 12, 25). The language quoted has not been in effect since the section was amended by Act July 31, 1946, Sec. 201 (60 Stat. 722, 725). In any event this case does not involve that Act and the petitioner never worked for respondent after August 29, 1935, when it was first enacted.

Petitioner also claims, in the language of Rule 38, that the Court of Appeals decided federal questions in a way probably in conflict with applicable decisions of this court. The point of conflict is not disclosed and the only decision of this court which is cited is *J. I. Case Company vs. N. L. R. B.*, 321 U. S. 332, 88 L. Ed. 762. This case is cited upon the proposition that "collective bargaining between an employer and a Union does not necessarily result in a contract of employment" (Petition, p. 25). Clearly, the decision of the Court of Appeals does not conflict with this rule.

Finally, petitioner says, again in the language of Rule 38, that the Court of Appeals departed so far from the usual course of judicial proceedings that this court should exercise its power of supervision. The nature of

the departure is not pointed out. Only three cases are cited other than the above decision of this court and none of them can be considered controlling here, so it would be impossible to depart from them.

The fact is that this case does not involve any dispute as to any principle. The decision of it turns upon the evidence in this case and this case alone. Concerning this evidence, the District Court made specific findings of fact. Upon this state of the record, the Court of Appeals said: " * * * we cannot say that its findings * * * are unsupported by the record." Granting a writ of *certiorari* is not warranted merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. vs. Western Electric Company, et al.*, 304 U. S. 175, 178, 82 L. Ed. 1273, 1275 (1938).

STATEMENT OF THE CASE

The petitioner filed this suit to recover the amount which he claims he would have earned had he not been refused employment by the respondent railroad, in violation of his alleged seniority rights. The case was removed to the United States District Court for the Northern District of Ohio, Western Division, by reason of diversity of citizenship. There, a jury was waived and the District Court found that under the terms of the application for employment, signed by the petitioner, and other evidence in the record, petitioner was only allowed to work for respondent on a temporary or probationary basis and that he held no seniority rights (R. 15, 16). Petitioner did so work for respondent during three different periods in 1929 and 1935 for approximately forty-seven days in the aggregate (R. 15). At the conclusion of this work his application for employment, which stated on its face that petitioner's employment was only temporary until it was approved,

was specifically disapproved by the General Manager of the respondent and petitioner was so notified (Ex. G, R. 173, 203, 204).

The District Court entered judgment for the respondent (R. 16), which was affirmed by the Court of Appeals for the Sixth Circuit (R. 235). The petitioner then filed his petition for a writ of *certiorari* in this court. The exhibits have not been printed in the record (R. 31), so we are compelled to refer to them by letter or number.

We believe some further statement of the case is necessary to correct inaccuracies or omissions in petitioner's summary statement. There, an effort is made to construe the evidence contrary to the construction placed upon it by the District Court, which was affirmed by the Court of Appeals. Petitioner repeatedly employs such language as "furlough," "recall" and "leave of absence" (Petition, pp, 4, 5). He thereby seeks to imply that his application for employment was approved by the General Manager in accordance with its terms, and that he held seniority rights. The District Court specifically found to the contrary and the Court of Appeals stated that "we cannot say that its findings upon this phase of the case are unsupported by the record" (R. 236).

A further illustration of the strained construction placed upon the evidence by the petitioner may be found in his assertion that from March, 1935 until July, 1940, he "repeatedly requested" additional medical examinations which were refused (Petition, p. 6), and that there was no evidence that he knew his name was dropped from the roster (Petition, p. 7). D. W. Cross, who succeeded J. F. Hazel, petitioner's friend (R. 200) and creditor (Ex. C.) as respondent's Superintendent of Motive Power, testified he did not see Gibbons between 1935, when he succeeded Hazel, and 1940 when Gibbons walked into Cross's office (R. 164). In this he was corroborated by the two other em-

ployees who worked in that office (R. 173, 204). Petitioner, on the other hand, testified he was in that office two or three times a month during this period to see about a physical examination (R. 102). It was on these occasions that he saw his name on the roster (R. 98, 99). Yet his own witness, E. F. Gensler, General Chairman of the B. of L. F. & E., produced copies of the rosters posted during this period, which showed petitioner's name wasn't there at all (R. 148, Ex. L. to R inclusive). It is obvious that petitioner's testimony was wholly lacking in credibility.

This situation further confirms the respondent's contention that a decision of this case turns on questions of fact, the credibility of the witnesses and an interpretation of the evidence rather than upon any principle of federal law. The fact is that a great many of the assertions in the petitioner's summary statement are either contrary to the findings of fact made by the District Court, or represent petitioner's interpretation of disputed evidence.

ARGUMENT

Summary of Argument

1. **The Petitioner's Employment By the Respondent Was Only Temporary Because His Application for Employment Provided That It Was To Be Temporary Until the Application Was Approved By the General Manager of the Respondent, and It Was Not So Approved But Was Specifically Disapproved.**

2. **The Requirement of Such Approval By the General Manager Was Not Waived By the Respondent Under All the Evidence in This Case Either By the Appearance of His Name on Four Seniority Rosters, By the Performance of Work By the Petitioner, or By the Delivery to Him By J. F. Hazel, Respondent's Superintendent of Motive Power, of a Recommendation for Employment Addressed "To All Concerned."**

1. The Petitioner's Employment Was Only Temporary Because His Application for Employment Was Not Approved By the General Manager of the Respondent.

The application for employment, signed by Gibbons, contained the following printed language immediately above his signature: "If put to work, I understand that my employment is only temporary until this application is approved." About one and one-half inches below Gibbons' signature is the printed word, "Approved:" and a line beneath which are the words "General Manager" (Ex. B.). This is the only place on the application for the approval referred to in the language immediately above Gibbons' signature. Before being sent to the General Manager for approval, the Superintendent makes his recommendation with reference to the employment of the applicant immediately above the point where the General Manager signifies his approval (R. 174).

Gibbons testified that he believed he read the application before he signed it (R. 94). It is clear therefore that he knew it was necessary that his application for employment be approved by the General Manager, and that he knew he was assigned to work as a "temporary" employee until his application was approved.

Where the parties to a contract specify that acceptance should be given in a certain manner, then acceptance in any other manner is insufficient. The rule is stated as follows in *Volume I, Restatement of the Law of Contracts*, Section 61:

> "ACCEPTANCE OF OFFER WHICH STATES PLACE, TIME OR MANNER OF ACCEPTANCE.
>
> "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract * * * ."

The requirement that the application for employment be approved by the General Manager serves a real purpose in promoting the safety and efficiency of the operation of the railroad. First of all, the references of the applicant are checked to determine his past history (R. 167). Secondly, the superintendent determines whether the prospective employee bears promise of rendering satisfactory service. If these requirements are met, the superintendent then makes his recommendation upon the application of the prospective employee and mails it to the General Manager for his approval (R. 174).

The time within which these prerequisites to the approval of the General Manager can be completed is from thirty to sixty days (R. 180). Gibbons, the petitioner in this case, did not work as a fireman as long as thirty days at any time or as long as sixty days in the aggregate (R. 220).

Numerous cases have recognized the necessity for such a probationary period to permit the investigation of a prospective employee's qualifications and physical condition. In *Walling vs. Nashville, C. & St. L. Ry.* 155 F. (2d) 1016, C. C. A. 6 (1946), the court said:

> "The persons involved were in training for positions as porters, callers, messengers, stenographers and clerks, who were commonly called 'posters' and as firemen, switchmen and brakemen, who were commonly called 'cubs.' It is uncontroverted that in each of these different positions a period of preliminary training is essential to the efficiency of the applicant therefor, as well as his safety and that of the public. It would be unthinkable to subject the lives of employees and passengers, to say nothing of property, to the hazards which would arise from the use of untrained and incompetent servants. A training period is mandatory."

Since the respondent sought to perform its duty to its other employees and to the public by requiring final approval of an application for employment by its General Manager, after certain preliminary steps had been taken, approval by any other person is not sufficient. A principal cannot be bound by the act of an agent without authority, particularly in a case where the limitation upon the agent's authority is brought home to the person dealing with him, as it was here by the language on Gibbons' application which read: "If put to work, I understand that my employment is only temporary until this application is approved."

Thus, under the evidence, the lower courts were clearly correct in holding that petitioner's employment was only temporary until approval of his application by the General Manager.

2. The Requirement of Approval By the General Manager Was Not Waived By the Respondent Under All the Evidence in This Case.

In the petitioner's amended complaint, he alleged that "some time prior to August 1, 1929, the defendant in writing accepted plaintiff's said application for employment" (R. 2). In the opening statement of petitioner's counsel, he said: "The evidence will show that the plaintiff did receive a letter advising him that he was accepted as an employee" (R. 33).

In the opening statement, respondent's counsel said: "I understand from Mr. Brady's statement that the plaintiff expects the evidence to show that he received a letter notifying him that his application had been approved" (R. 48, 49). Respondent's counsel further said: "The keystone of the case, it seems to me, is whether a letter was written to the plaintiff and received by him, by someone having authority to write such a letter, in 1929, stating that his application had been accepted" (R. 53).

At the close of the petitioner's case and in support of respondent's motion for judgment, counsel for respondent said: " * * * I stated in the opening statement, the receipt of this notice that his application had been accepted, which was alleged in the petition, was the keystone of the whole case. I think I used those very words, that was the keystone of his case, and the keystone seems to be missing" (R. 152).

The foregoing summarizes the position of respondent. There was no evidence of any kind that the application for employment, signed by Gibbons, was ever approved by the General Manager of the respondent.

Petitioner no longer claims that he has or ever will have such evidence. He now contends that the appearance of his name on certain rosters of the respondent (Petition, p. 13, Question 1) or the performance of work by the petitioner (Petition, p. 13, Question 3), or the delivery to him by J. F. Hazel, respondent's Superintendent of Motive Power, of a recommendation for employment addressed "To all concerned" (Petition, p. 13, Question 4) amounted to a waiver of the clear requirement apparent on the face of his application. This contention flies directly in the face of the fourth finding of fact of the District Court (R. 15).

In order to show a waiver by the respondent of the requirement that the application for employment must be approved by the General Manager, it was encumbent upon the petitioner to show a clear, unequivocal, decisive act by the General Manager which would amount to such a waiver on his part. *The White Company vs. The Canton Transportation Company*, 131 O. S. 190, 198, 2 N. E. (2d) 501, 505 (1936). It must not only be made intentionally but with full knowledge of the circumstances. *Bennecke vs. Connecticut Mutual Life Insurance Co.*, 105 U. S. 355, 359, 26 L. Ed. 990, 992 (1882). In this case, there was no evidence of any act of waiver on the part of the General Man-

ager. His only decisive acts were the rejection of the petitioner's application in 1935 (Ex. G, AA and BB) and the refusal to give him an *ex post facto* seniority date in 1940 (Exs. J and K).

This principle was applied by the Supreme Court of Oklahoma in *C. R. I. & P. Ry. Co. vs Sawyer*, 176 Okla. 446, 56 P. (2d) 418 (1936), a case which we deem persuasive on this question. There, the plaintiff was working in defendant's ticket office in Oklahoma City with a seniority date of May 2, 1919. In 1925, he was offered a position on another division of the railroad, so he consulted with his superior the depot ticket agent, and also the division passenger agent, as to whether the acceptance of the new position would affect his seniority. They advised him that when the new work ceased, plaintiff could return to his old job with his seniority unimpaired. In July, 1926, he was returned to his old job and continued there until September, 1931 when it was abolished. From 1926 to 1931, his name appeared on the roster with a seniority date of May 2, 1919.

When his job was abolished, he sought to bid in another job but was met with the contention that he held seniority only from July, 1926, when he returned to his old job. The defendant concurred in this contention of the Union and the employee holding the job and refused to make the change. Since the plaintiff could not find other work with the defendant, he took other employment after a lapse of seven months.

The plaintiff received a judgment for seven months salary, which was reversed by the Supreme Court of Oklahoma. Concerning the effect of the assurance given plaintiff by his superiors, the court said:

> "They promised him two things: (1) That he should have his old job when he returned to Richard's office; and (2) his seniority should be unaf-

fected. They performed the first, and no complaint is made on that point. The second they did not fulfill.

"The failure of the defendant to make good the promise of its agents in the second particular did not give rise to a cause of action on the part of the plaintiff. It is true, as urged by plaintiff, that defendant, a corporation, can only act through its agents. *American Soda Fountain Co. vs. Stolzenbach*, 75 N. J. Law 721, 68 A. 1078, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822. But this rule exists only with concomitant rules, and one of these is that an agent ordinarily cannot act for or bind the corporation in matters not within the scope of the agent's authority. The alleged agreement of these agents of defendant to preserve the seniority of plaintiff was beyond the power of the corporation, and, under the overwhelming evidence of this record, the agreement touched upon a matter wholly without the scope of the authority, apparent or real, of these agents. * * * The defendant cannot be bound by this agreement nor suffer for its breach, unless estoppel enters in."

The court then turned to the question of estoppel and stated that an estoppel could not arise because there was no false representation or concealment, saying:

" * * * It cannot be said that the representation was falsely made or that any known fact was concealed. It cannot be said that plaintiff was without knowledge or without means of knowledge."

The appearance of the petitioner's name on four seniority rosters cannot amount to a waiver of approval of his application by the General Manager because, as found by the trial court, there was no evidence that the General Manager had any knowledge of this fact. It cannot amount to an estoppel because there was neither any intentional

deception of the petitioner nor any reliance by him upon the fact that his name did appear on the roster. In fact, he did not even know his name was removed from the roster. The petitioner failed to establish facts upon which an estoppel could be based because he did not show any intentional deception on the part of the respondent or that he had been mislead to his injury. See *Brant vs. Virginia Coal and Iron Co.*, 93 U. S. 326, 335, 23 L. Ed. 927, 929 (1876).

Neither could the performance of work by the petitioner operate as an estoppel to prevent the respondent from claiming that such employment was only temporary until his application was approved. The necessary prerequisites to approval of his application have already been pointed out in this brief. Clearly, all of these matters could not be determined until the applicant had performed at least some service and during this period his employment was probationary, or as stated in the application "temporary."

The letter addressed by J. F. Hazel, petitioner's friend (R. 200) and creditor (Ex. C), "To all concerned" was nothing more or less than a recommendation permitting him to obtain employment elsewhere. It was accurately interpreted by the trial court in remarks made during the course of the trial as follows:

> " * * * I might say to counsel that so far as this communication 'To whom it may concern' goes, I don't believe that I could place the importance on it that counsel for plaintiff seems to feel that it carries. * * * Now this was not an attempt at the time of its dictation to be a communication from the railroad to the plaintiff assuring him of a position and in effect making of itself an agreement or contract of employment. It was a letter that was designed

> to help the plaintiff to obtain employment; so that I don't place the importance on that that counsel seemingly does in his treatment of that document. * * * " (R. 158, 159).

Furthermore, the "To all concerned" letter was not even an accurate statement of facts known to Hazel. The petitioner had not been in the employ of Shore Line "for some little time" as Hazel said, nor was the statement that he "will be returned to service" justified in view of the letter which Hazel had theretofore received, dated February 28, 1935, from the General Manager stating that John Gibbons, who had applied for work as a fireman, should not be employed (Ex. AA). Perhaps Hazel was just a little anxious to get his loan repaid.

CONCLUSION

We believe that the foregoing answers all of the questions raised by the petition filed herein, and shows that the determination of them involves a review of the evidence in this case and this case alone. No federal question is presented.

There is only one further point we have not covered which is involved in the statement of the third question presented by the petitioner. This question inquires whether the employer-employee relationship could be terminated except in accordance with the Brotherhood agreements after petitioner became a regular fireman. Obviously, this statement begs the entire question. We maintain that he never became a regular fireman and both of the lower courts have so held.

The petitioner's application for employment, which he read, showed on its face that it was to be approved by the General Manager of the respondent. It was not so approved. Such approval was never waived by respondent and the trial court so found. These findings were affirmed by the Court of Appeals. Consequently, the petitioner never acquired any seniority rights and since this suit is based upon an alleged violation of seniority rights, the petitioner failed to establish his case. All of this involves primarily a consideration of questions of fact and the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

WALTER A. EVERSMAN,
WILLIAM H. BLACK, JR.,

WILLIAMS AND EVERSMAN,
Counsel for Respondent.